INDEX

Page

QUESTION PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT:

Title V of the Independent Offices Appropriations Act for 1952 does not authorize the annual assessments on electric utilities proposed by the Federal Power Commission 10

I. The Federal Power Act precludes the FPC from assessing charges for the general administration of Parts II and III of the Act and was not superseded by Title V of the Independent Offices Appropriations Act for 1952 10

II. The general administration of Parts II and III of the Federal Power Act does not constitute the conferring of a "benefit" on the electric utility industry within the meaning of Title V 13

III. The legislative history of Title V conclusively sustains the decision of the Court of Appeals 18

IV. The Bureau of Budget's consistent construction of Title V supports the interpretation of the Court below 31

V. The Federal Power Commission had previously consistently construed Title V as having limited scope 41

CONCLUSION 48

CITATIONS

CASES: Page

Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964) 26

Clay Broadcasting Corp. v. United States, 464 F.2d 1313 (5th Cir. 1972), cert. granted *sub nom.* National Cable Television Association v. United States, No. 72-948 .....4, 47

Dairyland Power Cooperative, 37 F.P.C. 12 (1967) .. 16

Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968) 5

Jersey Central Power and Light Co. v. FPC, 319 U.S. 61 (1943) 5

New England Electric System, 38 S.E.C. 193 (1958) .. 3

Old Colony R. Co. v. Commissioner, 284 U.S. 552 (1932) 17

Public Service Commission of the State of New York v. FPC, 436 F.2d 904 (D.C. Cir. 1970) 39

United States v. Merriam, 263 U.S. 179 (1923) 17

U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968) .. 44

STATUTES AND REGULATIONS:

Federal Power Act, 16 U.S.C. § 791a, et seq. .....*passim*

Section 10(e), 16 U.S.C. § 803(e) 7, 8, 10, 11, 12
Section 201(a), 16 U.S.C. § 824(a) 5
Section 201(f), 16 U.S.C. § 824(f) 16
Section 202(e), 16 U.S.C. § 824a(e) 4
Section 203, 16 U.S.C. § 824b 4
Section 204, 16 U.S.C. § 824c 4, 26
Section 205, 16 U.S.C. § 824d 4, 14
Section 305, 16 U.S.C. § 825d 4
Section 311, 16 U.S.C. § 825j 5
Section 312, 16 U.S.C. § 825k 11
Section 318, 16 U.S.C. § 825q 4

Federal Water Power Act, 41 Stat. 1062 .....7, 11

Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. § 483a .....*passim*

Natural Gas Act, 15 U.S.C. § 717, et seq. 2, 5, 13, 20, 25, 42, 46

Public Utility Act of 1935, Title II, 49 Stat. 838..7, 10, 11, 12

Page

Public Utility Holding Company Act, 15 U.S.C. § 79 et seq. 2, 3
Section 2(a)(29(a), 15 U.S.C. § 79(b)(a)(29) .. 3

10 C.F.R. § 170.12(a) 47
10 C.F.R. § 170.12(b) 47
10 C.F.R. § 170.12(c) 47
10 C.F.R. § 170.21 47
14 C.F.R. § 389.25 47
14 C.F.R. § 389.25(a)(2) 47
14 C.F.R. § 240.12b-7 47
17 C.F.R. § 240.15b9-1 47
17 C.F.R. § 240.15b9-2 47
17 C.F.R. § 275.203-3 47
49 C.F.R. § 1002.2 47

MISCELLANEOUS:

97 Cong. Rec. 4908 28

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1952, 82d Cong., 1st Sess. (1951) 21, 22, 23, 24, 25, 26

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess. (1952) 42, 43

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1954, 83d Cong., 1st Sess. (1953) 26

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1955, 83d Cong., 2d Sess. (1954) 44

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess. (1970) 6

Page

Notice of Proposed Rulemaking, Docket No. R-282, issued September 22, 1965, 30 F.R. 12077 46

Bureau of the Budget Bulletin No. 51-13, May 21, 1951 31

Bureau of the Budget Circular No. A-25, November 5, 1953 32

Bureau of the Budget Bulletin No. 58-3, November 13, 1957 .....32, 33

Bureau of the Budget Circular No. A-25, September 23, 1959 .....9, 10, 15, 35, 36

FPC Order Nos. 317 and 317-A, 35 F.P.C. 30, 392 (1966) 45

S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 11

H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 11

S. Rep. No. 2120, 81st Cong., 2d Sess. (1950) 18, 37

H.R. Rep. No. 384, 82d Cong., 1st Sess. (1951) 12, 27

S. Rep. No. 1467, 84th Cong., 2d Sess. (1956) 21, 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT NEW ENGLAND POWER COMPANY

QUESTION PRESENTED

Whether Title V of the Independent Offices Appropriations Act for 1952 authorizes the FPC to assess annual charges on electric utilities subject to its jurisdiction to recover the unreimbursed cost of its activities under Parts II and III of the Federal Power Act, including the cost of investigations, studies, and programs the FPC decides to undertake under the broad authority thereof, in addition to authorizing the imposition of filing fees on electric

utilities seeking Commission authorizations under the Act.[1]

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent New England Power Company ("NEPCO") supplements the statement of the case set forth in the brief for petitioner Federal Power Commission ("Commission", "FPC" or "Government") in the following particulars.

A. NEPCO is engaged in the generation, purchase, transmission and sale of electric energy at wholesale in interstate commerce and also sells at retail to a small number of industrial customers. It does business in Massachusetts, New Hampshire, and Vermont and is subject to the jurisdiction of the Federal Power Commission under the Federal Power Act, as well as the jurisdiction of the public utility commission of each of the states in which it does business. NEPCO is a subsidiary of New England Electric System ("NEES") which is a registered holding company subject to the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79 et seq.)

In addition to owning all of the common stock of NEPCO, NEES also owns all of the common stock in three other utilities engaged principally in the business of distributing electric energy to ultimate consumers. Those utilities are Granite State Electric Company, Massachusetts Electric Company, and the Narragansett Electric Company. Pursuant to rate schedules of file with the Federal Power Commission

[1] Also before the Court in appeals which have been consolidated is the question of the validity of certain annual charges assessed by the Commission against interstate natural gas pipelines to cover regulatory costs under the Natural Gas Act. That issue, involving a different industry and a different regulatory statute, is treated by other respondents in separate briefs.

the three distribution utilities purchase all of their energy at wholesale from NEPCO.

All but Granite State Electric Company own facilities used for the transmission of electric energy in interstate commerce and are public utilities within the meaning of the Federal Power Act. The functional arrangement within the NEES system whereby one utility, NEPCO, provides the bulk power supply and other utilities within the system purchase that power for distribution at retail is not a typical arrangement within the electric utility industry. Most utilities operate outside of a holding company system and are vertically integrated, i.e., they generate, transmit and sell at retail most of their power. Those utilities which operate within holding company systems are also, with very few exceptions, vertically integrated. The NEES system has developed its particular operating arrangements for historical, legal, and financial reasons. As subsidiary utilities of a holding company system registered under the Public Utility Holding Company Act, however, NEPCO and the three distribution affiliates operate as an integrated public utility system.[2]

---

[2] Section 2(a) (29) (A) (15 U.S.C. § 79(b)(a)(29)) of the Public Utility Holding Company Act defines an integrated public utility system, in pertinent part, as

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States * * *

The Securities and Exchange Commission found the electric properties of the NEES system to be an integrated public utility system in 1958. *In the Matter of New England Electric System*, 38 SEC 193.

Before the Commission and the court of appeals NEPCO challenged not only the authority of the Commission to assess the annual charges involved here, but also contended that the formula adopted discriminated against it. The court below, however, held that "since it is our view that the Commission lacked statutory authority to act, we pretermit consideration of the latter issue . . ." (Pet. App. 2a.) Consequently, although the allocation issue is of great importance to NEPCO, it is not before the Court in this case and we do not brief it. We stress this point because the Fifth Circuit did decide the reasonableness of the FCC allocation formula at issue in *Clay Broadcasting Corp.* v. *U.S.*, 464 F.2d 1313, now before the Court *sub nom. National Cable Television Assoc.* v. *U.S.*, No. 72-948, and the Goverment's brief improperly seems to raise the fee formula issue in this case in several footnotes (Br. 15, n.8; 20, n.14).

B. While Parts II and III of the Federal Power Act authorize a wide range of activities by the FPC, including general investigations, studies and programs, regulatory jurisdiction over electric utilities under Parts II and III is strictly limited.[3] The

[3] Public utilities must make filings or file applications only in connection with the export of electric energy to a foreign country (§ 202(e), 16 U.S.C. ¶ 824a(e)); certain dispositions and consolidations of property used in interstate commerce and purchases of securities unless such transactions are also subject to the jurisdiction of the SEC (§§ 203, 318; 16 U.S.C. §§ 824b, 825q); security issuances and assumptions of liability, but only if not regulated by the state in which the public utility is organized and operating or the SEC (§§ 204, 318; 16 U.S.C. §§ 824c, 825q); wholesale for resale rate schedules and power contracts governing inter-utility relationships in interstate commerce (§ 205, 16 U.S.C. § 824d); and the holding of certain interlocking directorates (§ 305, 16 U.S.C. § 825d).

FPC is granted jurisdiction only over investor-owned electric utilities engaged in interstate commerce, which are defined as "public utilities" under the Act. It is not granted any jurisdiction over facilities used for the generation, intrastate transmission or local distribution of electric energy, nor are utilities required to obtain FPC licensing or certification of facilities necessary to conduct even interstate business, as are pipelines under the Natural Gas Act. Furthermore, the Commission has no jurisdiction over any activity already regulated by the Securities and Exchange Commission. See *Duke Power Company* v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968).

Parts II and III, enacted in 1935, were designed to fill the gap in state regulatory authority when electric utilities operate in interstate commerce. *Jersey Central Power and Light Company* v. *FPC*, 319 U.S. 61 (1943). Congress left to the States their pervasive authority over the certification of facilities, standards of service, retail rates, security issues and activities of electric utilities in general within each state. The regulatory provisions of Parts II and III "... extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

Congress also "authorized and directed [the Commission] to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy," in order to 'secure information necessary or appropriate as a basis for recommending legislation."[4]

---

[4] 16 U.S.C. § 825j. This section specifies the detailed data which the Commission is to collect and maintain and directs that the Commission is to analyze "the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense" and to report the results of its investigations to Congress.

Under that athority the Commission carries out a wide variety of programs of a general evaluative and investigatory nature, such as its National Power Survey, which comprise a substantial portion of its annual budget.[5]

The filing fees established by the Commission for applications and other filings invoking Commission action under Parts II and III of the Federal Power Act were not challenged in the court below and include fees for (1) applications for physical connections to transmission facilities in interstate commerce and the construction of interconnected facilities at the national border, (2) applications for the acquisition by merger or consolidation, directly or indirectly, of facilities of another person used or useful for the interstate transmission of electric energy or for disposition by sale, lease or otherwise of such electric facilities to another person, (3) applications by officers or directors of public utilities to hold similar positions in other corporations, (4) all other corporate applications authorized by the Commission's regulations, and (5) all rate schedule filings under the Federal Power Act, such rate schedules being limited to contracts involving the transmission or sale for resale of electric energy in interstate commerce (R. 213-16).

---

[5] For fiscal 1971, the FPC requested $2.2 million for such purposes, denominated "Electric Power Industry Systems Evaluation", compared to $1.7 million for "Electric Power Utilities Regulation", which included such regulatory activities as rate and accounting surveillance, rate filings and corporate applications, and formal proceedings. *Hearings on Appropriations for Fiscal 1971 for Independent Offices and Dept. of HUD Before a Subcommittee of the House Committee on Appropriations*, 91st Cong., 2d Sess. 947, 966 (1970).

C. The Government asserts (Br. 9):

> "In its order establishing the annual charges the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (Pet. App. 30a)."

The cited portion of the Commission's order does not discuss the Commission's "coordination and reliability programs", and NEPCO respectfully asserts that the Commission order did not even define its "coordination and reliability programs", much less "identify" any alleged benefits.

SUMMARY OF ARGUMENT

Under Part I of the Federal Power Act (originally the Federal Water Power Act of 1920) the Federal Power Commission exercises comprehensive licensing authority over non-Federal hydroelectric power projects utilizing the federally-owned lands or navigable waterways of the United States. Licensees under that Act enjoy rights to the use of the lands or waters involved for power generation purposes and are required by section 10(e), 16 U.S.C. § 803(e), to pay annual charges to reimburse the Government for the FPC's costs of administering that licensing program. Title II of the Public Utility Act of 1935 established the Federal Power Act and under Parts II and III, among other matters, conferred on the FPC jurisdiction over electric utilities in areas which Congress

felt were beyond the powers of the states to regulate because they involved interstate commerce. At that time Congress deliberately chose not to extend the total cost recoupment principle of section 10(e) to parts II and III of the Act, although it did expressly authorize the Commission to make reasonable charges for its publications and for "special and periodic services". 16 U.S.C. § 825k.

In 1951, as a result of its desire to implement a consistent policy for assessing "user charges" on "special beneficiaries" of various federal programs, Congress enacted Title V of the Independent Offices Appropriations Act for 1952, authorizing all federal agencies to assess "fair and equitable" fees in connection with any "work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility" furnished any person. A savings clause provided that Title V was not intended to "repeal or modify existing statutes prohibiting the collection . . . of any fee, charge or price".

New England Power Company contends that the Federal Power Act (1) must be construed to prohibit the charging of fees to recover the FPC's costs for all of its regulatory and non-regulatory programs under parts II and III of the Federal Power Act,[6] (2) is therefore not superseded by Title V, whatever that later Act's scope, and (3) consequently, the FPC's

---

[6] By non-regulatory program costs NEPCO means those costs associated with general Commission investigations, studies and other activities other than those for which filing fees are assessed, and which are generally described in the Commission's budget as "Electric Power Industry Systems Evaluation". See n.5 *supra*.

proposed annual assessments on public utilities to recover its costs of administering parts II and III, other than those associated with special applications or filings of individual utilities, were properly invalidated by the court of appeals.

Even if the 1935 act is not construed so as to bar the disputed assessments, Title V does not confer the broad authority sought by the Government. The general administration of Parts II and III of the Federal Power Act does not constitute a "benefit" to electric utilities, either individually or as a class, for which a fee may be charged within the meaning of Title V. Rather, the relevant hearings, committee report, and floor debate make it clear that Congress intended only to authorize the imposition of fees on "special beneficiaries" of federal activities to recover a fair portion of the costs associated with such activities. The limited purpose of Title V has consistently been recognized by the Bureau of the Budget in carrying out the President's responsibility to establish a uniform policy for implementing the fee-setting authority. The basic guidelines are set forth in Bureau of the Budget Circular A-25 of 1959, and apply to "all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large." They direct that "a reasonable . . . charge should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." The court below correctly held that the Commission's alleged creation of a favorable "economic climate" for the electric utility industry cannot be squeezed within the kind of "special benefit" con-

templated by Title V and Circular A-25, even if such an "economic climate" could be (1) ascertained and (2) judged to be beneficial to some degree.

The narrow scope of Title V has consistently been recognized by all federal agencies, including the FPC until the present controversy, and they have limited its application almost uniformly to the assessment of filing and license fees, or to various annual levies on holders of a variety of licenses, certificates of convenience and necessity, or similar authorizations.

ARGUMENT

Title V of the Independent Offices Appropriations Act for 1952 Does Not Authorize the Annual Assessments on Electric Utilities Proposed by the Federal Power Commission

I. THE FEDERAL POWER ACT PRECLUDES THE FPC FROM ASSESSING CHARGES FOR THE GENERAL ADMINISTRATION OF PARTS II AND III AND WAS NOT SUPERSEDED BY TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT FOR 1952.

Part I of the Federal Power Act contains the Commission's hydroelectric project licensing authority, originally enacted in 1920. Section 10(e) of the Act (16 U.S.C. § 803(e)) provides that costs of administering that part of the statute shall be recouped from the holders of the licenses issued thereunder, directing that "the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purposes of reimbursing the United States for the costs of administration of this Part." Limited regulatory responsibilities over electric utilities were given to the Commission in 1935 by the Public Utility Act of 1935 and denominated Parts

II and III of the Federal Power Act.[7] However, even though Congress was fully aware of the purpose of and experience under section 10(e), it deliberately decided against extending its application to Parts II and III. Thus the Senate Committee explained its restrictive amendment to section 10(e) as follows:[8]

> "Several minor changes are made in section 10(e), relating to charges to be paid by licensees. The charge to be fixed by the Commission for the purpose of reimbursing the United States for the cost of administration is limited to the cost of administering this part of the act, instead of the entire act. This makes no change in the present situation, but confines the charges to those needed for the administration of the water power provisions."

Although Congress took pains to provide that the kind of total program cost recoupment authorized for licensing functions in section 10(e) was not to be applied to parts II and III, section 312 of the Act expressly authorized the Commission to sell its publications at "reasonable prices" and "to make such charges as it deems reasonable for special statistical services and other special or periodic services." 16 U.S.C. § 825k.

---

[7] Part I of the Federal Power Act was originally enacted as the Federal Water Power Act of 1920 (41 Stat. 1062). By Title II of the Public Utility Act of 1935 (49 Stat. 838), that Act was made Part I of the Federal Power Act and Parts II and III added. (16 U.S.C. § 791a, *et seq.*) Part II vests in the Commission jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy in interstate commerce by public utilities. Part III carries the administrative and procedural provisions of the Federal Power Act.

[8] S. Rep. No. 621, 74th Cong., 1st Sess. 45 (1935). *Accord*, H.R. Rep. No. 1318, 74th Cong., 1st Sess. 24 (1935).

Consequently, the legislative history of the 1935 Act reinforces the *expressio unius, exclusio alterius* rule of statutory construction to make it clear that Congress deliberately withheld authority from the FPC to make its programs under Parts II and III of the Federal Power Act fully self-sustaining through the imposition of annual fees or charges.

The court below recognized that it was "highly significant" that Congress expressly chose not to make the principle of section 10(e) applicable to parts II and III of the Federal Power Act. (Pet. App. 13a). The Government, however, asserts that Congress' action in 1935 "has no significant bearing on the issue here, since Title V expressly authorizes the imposition of fees and charges and was obviously intended to provide for charges where no such authorization previously existed". (Br. 23). This superficial analysis ignores the savings clause in Title V providing that "nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price", which the committee report on the bill explained meant that Title V "would authorize and encourage the charging or increasing of fees to the extent *permitted under present basic laws*".[9] Although the Public Utility Act of 1935 did not incorporate an express prohibition against the kind of charges proposed by the FPC, the Federal Power Act clearly must be construed to prohibit such charges and is therefore unaffected by Title V.

---

[9] H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2 (1951) (emphasis added).

II. THE GENERAL ADMINISTRATION OF PARTS II AND III OF THE FEDERAL POWER ACT DOES NOT CONSTITUTE THE CONFERRING OF A "BENEFIT" ON THE ELECTRIC UTILITY INDUSTRY WITHIN THE MEANING OF TITLE V

Title V of the Independent Offices Appropriations Act for 1952 provides, in pertinent part, as follows (31 U.S.C. § 483a):

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses) . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized . . . to prescribe therefor such fee, charge or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served and other pertinent facts . . .

The annual charges proposed by the Commission and invalidated by the court below are not assessed in connection with the grant by the Commission of a "privilege", "franchise", "license", "permit", "certificate", or "use of federal property", since the Commission exercises no formal licensing or certification authority under Parts II and III of the Federal Power Act. The act does not even require electric utilities to obtain a certificate of convenience and necessity to construct and operate interstate transmission facilities, in contrast to the regulatory requirements for interstate natural gas pipelines under the Natural Gas Act.

With respect to filings and applications made pursuant to the requirements of Parts II and III of the Act which invoke the exercise of Commission regulatory "authority", the resulting Commission activity in response thereto may arguably be considered "work" or "service" providing a special "benefit" to the filing utility over and above the Commission's overall administration of the statute on behalf of the general public. There is no dispute as to the authority of the Commission to make such charges.[10]

The annual charges which were invalidated by the court below are of a distinctly different character from the substantial filing fees which are now in effect, in that they purport to cover costs under Parts II and III which cannot reasonably be assigned to particular "work" or "service" for the "benefit" of any specific utility. Thus, as the court below noted, they are indiscriminately imposed on many utilities "despite the fact that they had no proceedings before the Commission for that year." (Pet. App. 9a).

Thus, the issue is not, as the Commission abstractly and rhetorically states it, whether the Commission may lawfully "recoup a portion of its cost of administering the Federal Power Act . . . through the imposition of annual fees on companies subject to its jur-

---

[10] Although the propriety of the filing fees established by the Commission in connection with rate schedule filings under section 205 of the Act is a borderline case with respect to the scope of Title V since the Commission's rate regulatory authority is primarily for the benefit of the general consuming public, NEPCO chose not to contest the validity of those fees below inasmuch as such filings do generate Commission "work" necessitated solely by the initiating action of the filing utility. The filing fees range from $100 to $5000 for various applications and from $100 to in excess of $55,000 for rate increase filings. R. 213-16.

isdiction after taking into the consideration the benefits such companies receive from Commission regulation". (Pet. Br. 2). Rather, the question is whether such fees are reasonably related to identifiable benefits, if any, conferred on particular utilities and, if so, whether they are the kind of special benefits for which a fee is authorized under Title V.

The Government argues that there is nothing improper in an annual assessment, *per se,* as a means of recouping costs under the authority conferred by Title V. (Br. 14-15). That is not the issue before the Court. NEPCO does not contend and the court below did not hold that an "annual charge" might not be an appropriate way to assess charges for any "work" or "service" conferring a special benefit on an identifiable beneficiary. It is not the label or timing of the fee that is here at issue, but whether there is a sufficient nexus between such a fee and a measurable special benefit for which Congress intended a fee to be assessed. The critical question as to the authority for its imposition is whether it is grounded on Commission activity initiated by a utility's filing invoking the provisions of parts II and III of the Federal Power Act, so as to justify characterization as a "benefit" within the meaning of Title V and a "special benefit" within the meaning of Bureau of the Budget Circular No. A-25, on which the Commission relies.

The vice of the annual charge invalidated by the court below is that it does not in fact relate to any such special benefit. Rather, it is an attempt to recoup the total cost of the FPC under Parts II and III of the Federal Power Act, no matter what activities the FPC elects to undertake under its broad authority (other than certain undefined and essenti-

ally unknown costs associated with service to federal, cooperative and municipally-owned utilities not subject to FPC jurisdiction)[11] less those costs already covered by the uncontested filing fees.

With respect to the proposed annual assessments, the Commission's notice of proposed rulemaking stated (R. 6):

> We have also proposed a formula to recoup the remaining costs of our regulatory program and those incurred in the administration of reliability functions by assessments based on revenues as reasonably representative of the values of those services to such companies. We believe our activities in both areas of our operations provide special benefits to the companies subject to our jurisdiction that fully justify the scale of charges we propose to initiate.

The notice did not identify the "special benefits" referred to.

The Commission's Order No. 427 of March 18, 1971, asserted that its general regulatory and reliability programs "both have direct and substantial impact on the stability and operations of public utilities" and it rejected the contention that the costs of such pro-

---

[11] Section 201(f), 16 U.S.C. § 824(f), excludes from Part II jurisdiction the United States, a State or any political subdivision thereof and related instrumentalities. The Commission has held further that Part II does not apply to entities organized as cooperatives. Dairyland Power Cooperative, 37 FPC 12 (1967). To the extent that a portion of the annual costs can be assigned to work connected with such systems, no assessment will be made against those systems, and jurisdictional utilities will not have to pick up such costs (R. 213). The Commission did not indicate, however, how it would allocate costs between jurisdictional and nonjurisdictional utilities.

grams should properly be borne by the general taxpaying public (R. 205-06, emphasis added):

> The creation of regulatory agencies at the federal level and the exercise of the powers delegated by the Congress to them have provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved. We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefits of both industries *by creating the economic climate for greater usage of the services of the regulated companies* which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [Footnotes omitted]

The court of appeals rejected that justification for the annual assessments, holding that "creation of an 'economic climate' is not a 'special service' " and that "the contemplated charges would have no relation to specific services or benefits rendered." (Pet. App. 9a). It concluded that "the regulation of these industries is primarily for the benefit of the public" and that "in the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefiting the general public should come from the general fund of the treasury." [12] The court's practical, common sense construction of

---

[12] Pet. App. 10a. Since Title V is a revenue raising measure, it is to be construed strictly so as to resolve any doubts against the Government. *U.S.* v. *Merriam*, 263 U.S. 179, 187 (1923); *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560 (1932).

the section recognizes that Congress would not have left to the courts the difficult task to determine on a case-by-case, agency-by-agency basis whether the "economic climate" created by the programs administered by scores of federal regulatory and executive agencies was "beneficial" rather than "adverse", so as to justify requiring any identifiable beneficiaries to bear the full cost of such public programs. Congress obviously intended no such amorphous test for the applicability of Title V, and the Government cites not a shred of evidence from the legislative record to support the FPC's strained rationale. The opinion of the court below, on the other hand, comports fully with the narrower legislative purpose of Title V, as well as its administrative construction by the Bureau of the Budget, the FPC, and other federal agencies, to which we now turn.

III. THE LEGISLATIVE HISTORY OF TITLE V CONCLUSIVELY SUSTAINS THE DECISION OF THE COURT OF APPEALS

The appropriate starting point in the legislative history of Title V is the study carried out by the Senate Committee on Expenditures in the Executive Departments in 1950 which resulted in Senate Report No. 2120, 81st Cong., 2d Sess., entitled "Fees For Special Services". The question considered was "the practicability and propriety of establishing fees for services which the Federal Government renders to special interests," and the Committee's focus was described as follows (*Id.* at 1, emphasis added):

> The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the

> Federal budget as nonreimbursable by transferring the financial burden thereof to the *special beneficiaries.* Thus, at the outset, it is desired to draw a clear line of distinction between services which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large.

This theme was reiterated later in the report (*Id.* at 3, emphasis added):

> There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government *especially for them* should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to *special beneficiaries* the expense now being borne for them by the taxpayers at large.

The other dominant theme was that the substantive Congressional committees should assume the principal burden of studying the user charge practices of the agencies within their respective jurisdictions and initiate appropriate legislative proposals (*Id.*):

> At the outset, there had been considered the possibility that this committee itself would cause the drafting and introduction of appropriate general legislation to bring about the desired ends. The study, has, however, demonstrated clearly that the field is far too broad to be covered by general

> legislation; it must instead, if practical results are to be obtained, be covered by individual acts of Congress drafted by specialists in special fields. This report should provide a useful guide to the standing committees of the Congress having such jurisdictional authority.

The report contained a summary of the user fee reports from various agencies, including the following commentary on the FPC:[13]

> The committee recommends consideration of the several licensing functions of this agency. Fees are now charged pursuant to law to licensees under Part I of the Federal Power Act. The Commission also issues certificates of public convenience and necessity to natural-gas companies under the Natural Gas Act and administers certain regulations under part II of the Federal Power Act. The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs.

The Committee's concern only with fees related to the licensing functions of the Commission, as opposed to its overall regulatory and administrative activities, reflected the generally narrow area of user charge concern which was to carry over into the next Congress and result in the enactment of Title V of the Independent Offices Appropriations Act for 1952.

---

[13] *Id.* at 12. The Government relies on the last sentence of the paragraph as purportedly supporting the propriety of the annual assessments invalidated below. (Br. 23-24). However, that sentence is ambiguous at best. Not only is it a staff paraphrase of the FPC report, but it is not clear whether the suggestion related to Part II of the Federal Power Act as well as to the Natural Gas Act. In any event, the purported FPC suggestion concerned only a possible fee formula, not the kind of activity for which fees might reasonably be charged, which is the issue here.

The Committee then requested the Bureau of the Budget to complete the staff studies, and that general approach to further review of the problem was approved by the House Ways and Means Committee on December 30, 1950.[14] It was against that backdrop of a Congressionally initiated review of federal agency user fee practices, looking to further action on necessary legislative authorization by the substantive Congressional committees with respect to the agencies within their jurisdiction, that Title V was enacted.

Title V originated as a rider to H.R. 3380, which contained appropriations for federal independent offices for fiscal 1952 and was reported by the House Committee on Appropriations. Its genesis was the concern expressed by the members of the committee during the hearings in early 1951 [15] that a portion of the burgeoning costs of the Federal Government be recouped from special beneficiaries of various federal programs, the same concern reflected in the Senate study and report in the previous session, *supra*. Chairman Thomas and Rep. Yates, who was later to offer the only explanation made in either the House or the Senate of the purpose of Title V, took the lead in questioning each federal agency witness about his agency's fee policy. Two themes predominate in the hearings, both of which are fatal to the Government's

---

[14] The Bureau of the Budget review was initiated the following year and is discussed *infra* at pp. 31-32. Subsequent Bureau and Congressional action on the user fee study through 1956 is detailed in S. Rep. No. 1467, 84th Cong., 2d Sess. (1956).

[15] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1952*, 82nd Cong., 1st Sess. (1951).

construction of Title V and fully confirm the interpretation of the court below: (1) the committee was solely concerned with assessing fees relating to specific services, largely of the licensing category; and (2) there were repeated expressions that an agency's fees for such services ought to cover a portion of its associated administrative costs, but not a hint that entire agency programs ought to be made completely self-sustaining through assessments on individual users or the entire industries regulated.

The foregoing themes were highlighted early in the hearings by Rep. Yates' questions to the witnesses from the Interstate Commerce Commission:[16]

> *Mr. Yates.* I am a newcomer to this committee, but as I sat here I noticed practically all of the requests of the various agencies were for additional funds. The thought struck me as we have gone through this appropriation table today as to why the carriers under supervision should not pay a portion of the regulatory cost. . . . I know the States and municipalities, when they inspect passenger elevators, for instance, under their police powers, charge a license fee which in a measure meets the necessary cost of inspection. Why would not a charge be feasible to recapture some of the cost of the Commission?
>
> *Mr. Mahaffie.* It would be entirely feasible, as I see it. . . . .
>
> *Mr. Yates.* With respect to applications, for a certificate of convenience and necessity, are there any charges made?
>
> *Mr. Mahaffie.* None whatever, no matter if the hearing runs to 10,000 pages . . . .
>
> *Mr. Yates.* Would it be feasible, in your opinion, to make any sort of a charge for filing, or

[16] *Id.* at 281.

any other fees predicated upon this grant which, after all, is a grant under a theory of a regulated monopoly and is of value to the carrier?

Mr. Mahaffie. It would be entirely feasible, so far as I can see.

Rep. Yates reiterated to other agency witnesses his concern that a portion of the regulatory agencies' costs should be recouped from licensees and other applicants for special services. Witnesses for the Federal Communications Commission and the Securities and Exchange Commission explained that proposals for such fees had never been popular in Congress and would undoubtedly engender strong opposition:

[Federal Communications Commission][17]

Mr. Yates. Has the Commission given consideration to the possibility of imposing a charge for its services?

Mr. Plotkin. That has been before the Congress on several occasions. It has never been popular and it has never passed the Congress. It has been before the Legislative Committee.

Mr. Walker. We took that up as far back as 1934, when the Commission was first organized. But we have never gotten anywhere with it.

Mr. Yates. When you say you took it up, what did you do? Did you make a proposal that a charge be made for granting a certificate, or on filing an application? . . .

Mr. Plotkin. There was a study in 1940. There is an interdepartmental committee studying it for the Bureau of the Budget now.

Mr. Yates. Is a copy of that study available? I think with the costs of administration going

[17] *Id.* at 524.

up and up perhaps some of the costs should be borne by the applicants.

[Securities and Exchange Commission][18]

Mr. Yates. Do you charge any fees for registration of brokers?

Mr. Riordan. No, sir.

Mr. Yates. Would that not be a feasible fee-charging function? . . .

Mr. McDonald. I will answer that question, if you don't mind. Having been a broker-dealer, I can tell you there would be a great wail. . . .

Mr. Yates. You have about four or five thousand registered broker-dealers; is that true?

Mr. Riordan. That is right.

Mr. Yates. You don't think any portion of the cost of the regulation would be feasible to be charged against these people?

Mr. McDonald. That could be done by statute, but I would say you would run into terrific opposition.

Mr. Yates. What possibilities for obtaining fees are there besides the ones you already charge which might compensate in measure for the cost of regulation?

Mr. McDonald. You can't charge people for prosecuting them, and a great part of our work is the prosecution of brokers who have committed violations. . . .

Mr. Yates. Why not?

Mr. McDonald. Suppose you inspected one fellow as many as three of four time a year. I don't think it would be feasible to charge a man because you were suspicious of him.

Mr. Thomas. In other words, you are not rendering him a service by inspecting him?

Mr. McDonald. That is right. . . .

Mr. Yates. Isn't this a service which is necessary from the public viewpoint and which is

---

[18] *Id.* at 727-28, 730.

really beneficial as well to the broker-dealers in that it does provide a means of policing those who are not living up to certain standards?

Mr. McDonald. That would be invoking a different philosophy than is generally followed. Where you inspect a person for violations which might be criminal, where there might be a broker-dealer revocation, or possibly a criminal reference, it would seem to me not to be feasible to charge a fee.

The questioning of the Federal Power Commission witnesses by Chairman Thomas and Rep. Yates is particularly instructive. There was explicit recognition that the Commission only charged fees of licensees in connection with its hydroelectric project licensing responsibilities under Part I of the Act, in accordance with the mandate of section 10(e). The Committee focused primarily on the propriety of charging a licensing fee for pipeline certificates of public convenience and necessity under the Natural Gas Act, as had the Senate Committee on Expenditures in the Executive Departments in the previous Congress (*supra*, p. 20):[19]

Mr. Thomas. You only charge fees under the Federal Power Act, to be accurate about it; isn't that right?

Mr. Sechrest. Yes.

Mr. Thomas. You don't charge fees for your licensing of natural gas?

Mr. Sechrest. No.

Mr. Thomas. Isn't that a field for fees?

Mr. Wallgren. It certainly is.

Mr. Thomas. Is there any good reason why you shouldn't collect fees to help defray the

[19] *Id.* at 681.

> expenses of the activities of the Commission dealing with the regulation and granting of licenses of natural gas lines the same as you do for the licensing of electric-power installations?
>
> *Mr. Wallgren.* I think we should collect fees.

Rep. Yates, who was the most militant spokesman on behalf of increased fees and was familiar with public utility regulation, having served on the Illinois public utility commission,[20] went no further than to suggest the possibility of charging fees in connection with FPC authorization of certain security issues by electric utilities pursuant to section 204 of the Act:[21]

> *Mr. Yates.* What about the question of securities? Do any of your licensees under this part [I] of the act ever refinance or come in for additional issues of securities?
>
> *Mr. Charles W. Smith.* Yes; but the Commission has limitations on its jurisdiction over securities.
>
> *Mr. Yates.* Is it not feasible to make a charge for your investigation into the propriety of the security issue?
>
> *Mr. Charles W. Smith.* Yes, that could be done.

The House Committee report clearly showed that the purpose of Title V was simply to encourage Federal agencies to establish or increase fees for services rendered to special beneficiaries pending the completion of Congressional studies on the subject of fees

---

[20] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1954*, 83rd Cong., 1st Sess. 176 (1953).

[21] *Hearings on 1952 Appropriations*, n. 15 *supra* at 689.

and the eventual enactment of necessary amendatory legislation:[22]

> The Committee is concerned that the Government is not receiving full return from many of the *services which it renders to special beneficiaries.*
>
> . . .
>
> It is understood that other committees of the Congress have interested themselves in this matter and that studies now are underway which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, p. 60) which would authorize and encourage the charging or increasing of fees *to the extent permitted under present basic laws* but which would in no way conflict with studies now underway to effect changes in such basic laws.
>
> It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that *fees could be charged for other services of similar types* in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.
>
> The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges when present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made.

---

[22] H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2 (1951) (Emphasis added.)

The only discussion of Title V during the debates on the bill was by Representative Yates, who offered the following explanation:[23]

> "For the first time, our subcommittee went into a new question, the question as to whether or not there should be charges and fees made by regulatory agencies of the Government *for many of the services* which they render to those who come within their jurisdiction. . . . As an example, I cite the Federal Communications Commission. The Federal Communications Commission grants *franchises, licenses, certificates of convenience and necessity* if you will, to all broadcasting stations upon application for such licenses, franchises and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the *franchise* that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay *some of the costs* of the hearing. It is perfectly proper that the franchised company make a profit and there has been much profit making. Such companies should assume a *greater share of the costs,* because regulation is neces-

[23] 97 Cong. Rec. 4809 (1951) (Emphasis added).

sary. I think also that the Government should be able to recapture *some of the costs* that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it required a rather nominal licensing fee."

"The Interstate Commerce Commission is required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on *applications for certificates of convenience and necessity* for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application and in the operation of which franchise it is protected from competition."

"Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge *for a portion of the operations* of the agency and in each event the Commission thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible but would deter and do away with many superfluous applications. Therefore, the subcommittee in its deliberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own operations to see whether or not it would be possible to recapture for the Government *some of*

the costs that the Government incurs in connection with this regulation through the establishment of a schedule of fees."

The specific examples of services cited by Representative Yates reinforce the clear thrust of the hearings that Title V was intended merely to authorize fees for particular licensing-type services in order to recover a portion of agency expenses, and not to sanction an annual charge system for recovering an agency's total cost. Moreover, to read Title V as authorizing an agency to recoup the total cost of its programs renders surplusage the Congressional direction that fees charged under Title V shall "be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts". The specification of guidelines for setting the level of fees was a useless exercise by Congress if in fact it had already authorized regulatory agencies to assess the total cost of their programs on the regulated industries without regard to the factors listed.

H.R. 3880 was passed by the House without any further discussion or amendment of Title V. The section was not discussed in either the Senate hearings or debates, and it was passed by the Senate without amendment. It must be assumed that Title V was enacted with such minimal consideration by both houses only because of reliance by Congress on the explanation given in the House committee's report and by Rep. Yates as to its limited scope. It is inconceivable that Title V would have passed without debate or dissent if in fact it was effecting the radical revolution in the funding of the total programs of all federal agencies which the Government now argues for. As

agency witnesses testified during the House hearings, Congress had earlier resisted the imposition of even modest fees by regulatory agencies. (*Supra*, pp. 23-24) And, as we have shown, Congress had taken pains in 1935 to deny the very authority to recover the costs of administration of parts II and III of the Federal Power Act which the Government now contends was conferred obliquely by Title V. It was a Congressional desire not to disrupt existing statutory fee-setting provisions or to preempt the prerogatives of the substantive committees interested in the problem which prompted the savings clauses in Title V, as the committee report and Rep. Yates made clear.

IV. THE BUREAU OF BUDGET'S CONSISTENT CONSTRUCTION OF TITLE V SUPPORTS THE INTERPRETATION OF THE COURT BELOW

Title V provides that agency fees "shall be as uniform as practicable and subject to such policies as the President may prescribe." Implementation of that directive was carried out by the Bureau of the Budget (now the Office of Management and Budget), and hence its construction of Title V is significant. The Budget Bureau has consistently construed Title V as dealing with what has come to be known in shorthand as "user charges," a characterization which reinforces the legislative history of the section and which confirms the decision below.

On May 21, 1951, the Bureau of the Budget circulated to the heads of all executive departments and agencies Bulletin No. 51-13, dealing with "charges for Government services and products." (Appendix A hereto). It detailed Congressional concern about the subject, including the House Committee's report on

Title V, and described the purpose of the accompanying questionnaire (p. 2):

> The questionnaire covers all goods and services which are of direct benefit to limited groups of individuals, businesses, and other organizations. Services which are provided to identifiable individuals, business, or other organizations should be reported even though they are also indirectly of benefit to the general public.

The kinds of goods and services which were to be reported on included "(1) Coinage services, (2) Permits, licenses, and other registration services, (3) Use of money (through loan and advances), (4) Use of property, (5) Leases for obtaining minerals, oil, gas, etc., (6) Use of patents, copyrights, etc., (7) Other products provided, [and] (8) Other services provided." *Id.* In the sample questionnaire attached to the bulletin, illustrations of "other services provided" were "testing oil filters, statistical tabulations, and market news services".

On November 5, 1953, the Budget Bureau issued Circular A-25 as a guide to implementation of Title V. The 1953 circular dealt with "fees for licensing, registration, and related activites", and it is clear from that circular that "related activities" did not encompass fees to recover the overall costs for administration of an agency's non-licensing functions such as were contemplated under the annual charges invalidated below.

A major revision in the Bureau of the Budget's program occurred in 1957 when the Bureau issued Bulletin No. 58-3 (November 13, 1957) superseding Circular A-25. (Appendix B hereto). It was

captioned "User charges for certain Government services" and was the result of what the Director of the Budget characterized as "a careful and thorough joint interdepartmental review of the problem." (p. 1). That study and report, attached as an appendix to Bulletin No. 58-3, recognized that "among the numerous services performed by the Federal Government in the public interest, many provide an *added special benefit* to individuals or groups." (p. I-6, emphasis added). The report also makes it quite clear that the Bureau of the Budget did not consider that the general regulatory activities of the Federal Power Commission, or any other federal agency, constituted the conferring of "special benefits" on the regulated parties within the meaning of Title V. Thus the coverage of what was described as "an overall review of agency user charge practices" conspicuously omitted any survey of the general regulatory activities of the independent regulatory agencies (*id.*):

> *Joint interagency study*
>
> To achieve the above objective, the President requested that several executive agencies join together to study the problem involved and make any necessary recommendations to him. In the resulting report an overall review of agency user charge practices has been made and recommendations have been developed with respect to (1) general policies governing charges, (2) specific standards and criteria to be used in determining fees, and (3) measures for implementing a positive user charge program.
>
> *Coverage*
>
> The scope of the study was Government-wide in its application, but the study itself covered only a selected number of agencies and operations

within those agencies. The activities examined on a sample basis included: licensing; testing, inspection and grading; use of air and water navigation aids and facilities; use of money and credit; publications; maps, charts, and aerial photographs; special studies, recreation and tourist facilities; grazing; oil, gas, and mineral leasing and mining claims; miscellaneous land uses; and use of Government-owned patents. Selected operations which reflect the major non-Federal users or beneficiaries within each of these general activities were examined.

Regulatory agencies are mentioned only in the context of their licensing responsibilities (*id.* at I-7):

1. In the licensing activity, the charges range from zero to 100 percent of the costs. No charge, for example, is made for the issuance of Federal Communications Commission and Interstate Commerce Commission regulatory licenses. On the other hand, the regulatory operation concerned with the national banks by the Comptroller of Currency is self-sustaining, and the issuance of patents and the registration of trademarks by the Patent Office is approximately 45 percent self-sustaining. Within the Federal Power Commission, the licensing of utility company hydroelectric power facilities is nearly self-sustaining, while a comparable license in the natural gas field is provided free.

It is inconceivable that the Bureau of the Budget, notoriously aggressive in urging maximum utilization of user fees, would not have directed an inquiry into the feasibility of levying fees to recover the total general administrative costs of the regulatory agencies had it thought Title V authorized the imposition of such annual charges.

The study included specific recommendations "to the solution of the user charge problem" which, with minor modifications, became revised Circular No. A-25 issued September 23, 1959. (Appendix C hereto). Consistent with the legislative history of Title V, the circular applies to "all Federal activities which convey *special benefits to recipients above and beyond those accruing to the public at large*" and declares as general policy that "a reasonable charge . . . should be made to each *identifiable recipient* for a *measurable unit or amount of Government service* or property from which he derives a *special benefit.*" (p. 1, emphasis added).

While both the statement of coverage and the declaration of policy arguably encompass individual utilities which initiate or invoke Commission "service" in connection with particular applications or other filings, neither statement can be tortured to include the kind of general administrative and program activity under parts II and III of the Federal Power Act to which the disputed annual assessments relate.

It strains reason to equate the FPC's general program activities under parts II and III with "activities which convey special benefits to [electric utilities] above and beyond those accruing to the public at large", or to accept that the total costs of such general programs constitute "a measurable unit or amount of Government service" from which utilities derive a "special benefit". The Government brief, as did the Commission below, ignores the critical issue of identifying any "special benefit", and dwells on the question of whether the entire electric utility industry, as opposed to individual utilities, may properly be con-

sidered an "identifiable recipient". But that is hardly the central issue, since it is obvious that if each year every electric utility availed itself of Commission services conferring "special benefits . . . above and beyond those accruing to the public at large" there would be no vice in assessing some sort of annual charges on the "entire" industry, although the magnitude and allocation of such charges among industry members would remain of paramount concern. But that is not the case under parts II and III of the Federal Power Act. Many utilities never invoke FPC action in a given year, or indeed for many years, and when they do they pay the specified filing fees. Thus the validity of the disputed charges turns not on some abstract distinction between the whole industry and its constituent members (either of which are readily "identifiable"), but whether electric utilities, either individually or as a class, may be obligated to support the Commission's far ranging activities under parts II and III even though they receive no "special benefits" from such activities.

Indeed, the proposed annual assessments to recoup the Commission's costs of general activities under Parts II and III of the Federal Power Act appear to fall squarely within the express prohibtion of section 3a(2) of the circular:

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public (e.g., licensing of new biological products).

This prohibtion conforms to the original guidelines for the determination as to when user charges would

be appropriate which were suggested by the Senate committee in 1950:[24]

> The committee does not herein aline itself for or against the assessment of fees. Such a decision can prudently be made only after full and exhaustive hearings. There is no doubt, however, that of the 12 agencies included in this study, some render services the benefits of which accrue *wholly* to special interests which derive therefrom the means of financial success. The committee does incline to the view that, *in such instances,* the cost to which the Government is put should be borne by the beneficiaries. Where there is joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, *and where there is doubt as to the degree or preponderance of benefit, there should be no fee.*

Circular A-25 carefully describes the kind of "Special Services" for which charges should be made as follows (section 3):

a. *Special Services*

(1) Where a service (or privilege) provides benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue

---

[24] S. Rep. No. 2120, 81st Cong., 2nd Sess. 3-4 (1950) (emphasis added).

to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group or the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

The examples cited by the Bureau of the Budget significantly reflect the same limited concept of "special benefits" with which Congress was concerned and on which the Budget Bureau's user charge study had focused since 1951. They all involve either personalized service initiated at the request of an individual member of the public or the issuance of a formal "authorization", e.g. patents, licenses and certificates of convenience and necessity. Nowhere is there the slightest hint of the expansive authority sought by the Commission.

The Government argues that the FPC's general program, over and above the specific services for which it already collects filing fees, comes within the definition in section 3a(1)(b) on the ground that it "provides business stability or assures public confidence in the business activity of the beneficiary". (Br. 17). Leaving to one side the temptation to examine whether the FPC's general programs can reasonably be argued to

have produced "business stability" or promoted "public confidence" in the electric utility industry, the Government's argument can only be made remotely plausible by the Procrustean deletion of the illustrative examples used by the Bureau of the Budget to provide some points of reference for the general guidelines of the circular. The circular's guidelines cannot be read in such an artificial vacuum.

The Government attempts to buttress its reliance on section 3a(1)(b) by citing a utility textbook author's assertion "that the stringent accounting regulation enforced by the FPC was *not only* in the public interest, *but also* in the best interest of the operating companies concerned". (Br. 17-18, emphasis added). Similarly, the Government asserts that "the Commission's reliability and coordination programs enhance the ability of the electric utility companies to meet peak requirements with minimum generating capacity, and help ensure public confidence in the industry's ability to satisfy total demand." (Br. 19). Two points need be made about such assertions. First, neither assertion has any basis in the record of the rulemaking proceedings below, nor were the alleged illustrative benefits relied on by the Commission. Indeed, as we have pointed out, the Commission's "reliability and coordination programs" have never been defined, let alone a link established between them and the economic health of the electric utility industry generally. It is axiomatic that Government counsel cannot supply *ex post facto* rationalizations for Commission action.[25]

Second, assuming that such contentions are in fact accurate, at best the Government's argument boils

[25] Pub. Serv. Comm'n of N.Y. v. FPC, 436 F.2d 904, 905-06 (D.C. Cir. 1970).

down to an assertion that some of the general programs the FPC carries out under parts II and III of the Federal Power Act on behalf of the general public have some beneficial impact on the electric utility industry. *Res ipsa loquitor.* Since the electric utility industry is also part of the general public, that result is inevitable and is true of a wide variety of federal programs, such as those relating to labor relations, health, safety, welfare, and equal employment opportunity. Such programs all promote social objectives which Congress has declared to be in the public interest, and to the extent that they are attained they undoubtedly provide "business stability" and assure "public confidence" in the electric utility industry, but they are clearly not the kind of "special benefits" which Congress envisaged justifying the imposition of fees under Title V.

The Government faults the court below for its purported "virtual nullification" of Title V (Br. 21-22):

> Every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principal intended beneficiary of a particular program is sufficient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest) and the congressional goal, expressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible", would be defeated.

But this *in terrorem* argument cannot be taken seriously. All of the special benefits for which federal agencies, including the Commission, charge filing or

license fees also confer benefits on the general public and yet the validity of such charges is well established[26] and are not disputed here.

The fallacy of the Government's argument is that it wholly ignores the emphasis which Congress and the Budget Bureau have carefully given to the essential "*special* beneft" justification for the levying of fees. If the Government's rationale were adopted, to use its own *in terrorem* approach, the door would be open to loading the costs of a wide variety of federal programs on any industry or group which an executive agency could show was impacted by its particular program, and therefore an arguable "beneficiary". It is not necessary to elaborate on the great potential for abuse of the authority conferred in Title V inherent in the Government's position to make it obvious that Congresss never intended to confer such sweeping authority on the executive and regulatory agencies.

V. THE FEDERAL POWER COMMISSION HAD PREVIOUSLY CONSISTENTLY CONSTRUED TITLE V AS HAVING LIMITED SCOPE

Until it initiated the proposal to assess the annual charges which are at issue, the FPC consistently viewed the fee-charging authority conferred by Title V as relating only to specific functions of a licensing nature. Thus in the next session of Congress after enactment of Title V the Commission first told the House Appropriations Committee that it would need new legislative authority to impose fees for granting

---

[26] *Aeronautical Radio, Inc.* v. *U.S.*., 335 F. 2d 304 (7th Cir. 1964).

certificates of public convenience and necessity under the Natural Gas Act:[27]

> Mr. Sechrest. We collect no fees under the Natural Gas Act.
>
> Mr. Thomas. Why?
>
> Mr. Sechrest. We have no authority of law like we do under part 1 of the Federal Power Act. On the question of fees we have reviewed that problem, and we have increased the price of our publications about 50 percent.
>
> Mr. Thomas. Will it require legislation to charge a fee under the gas regulation activities?
>
> Mr. Sechrest. You might charge some minor fees. I would like to have Mr. Ross answer that question.
>
> Mr. Ross. I believe that it would require legislation to make charges, such as we do under part 1 of the Federal Power Act, where we assess charges which cover the cost of administration of that part of it, and that is specifically provided for in the Federal Power Act. We have no authority to charge such things under the Natural Gas Act.
>
> Mr. Thomas. You think it would require legislation to give you that authority?
>
> Mr. Ross. Yes.

The Commission later wrote the committee and explained that on reconsideration it had concluded that

---

[27] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1953*, 82nd Cong., 2d Sess. 559-60 (1952).

it had obtained limited authority under Title V to impose fees in connection with certain licensing and authorization regulatory activities:[28]

> During the hearing held January 23 on the Commission's appropriation request for fiscal year 1953, the statement was made (transcript pp. 1403-1404) that further legislation would be required to authorize the Commission to impose fees for services *similar to those authorized in Part I of the Federal Power Act.*
>
> Further consideration of the question since the date of the hearing indicates that Title V of the Independent Offices Appropriation Act, 1952, authorizes the Commission to impose fees *in connection with the issuance of certificates and other authorizations* under the Federal Power and Natural Gas Act.
>
> The Commission is now considering the advisability of levying such fees and charges in connection with its various regulatory duties.

The Government relies on the foregoing exchange to support its argument that Title V "was obviously intended to provide for charges in cases where no such authorization previously existed". (Br. 23, n. 15.) Although technically accurate to a limited degree, that assertion is obviously overly broad in the context of the issue before the Court. A more accurate appraisal is that neither Committee Chairman Thomas, who had been a principal architect of Title V a year earlier, nor

---

[28] *Id.* at 560 (emphasis added).

the Commission viewed Title V as conferring the sweeping authority the Commission now asserts.[29]

Two years later FPC Chairman Kuykendall advised the committee that the Commission was "pre-

---

[29] In several other instances the Government, unable to find support for its contentions in either the hearings, committee reports, or debates on Title V, falls back on bits and pieces from hearings and reports in later Congresses. (Br. 6, 7, 24-25). Such *ex post facto* legislative events are of "very little, if any, significance." *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). In any event, they do not support the Government's position. The recommendations by the appropriations committees in the 90th Congress that the agencies review their fee schedules (Br. 6) do not focus on the issue before the Court. Even more remote are the inferences the Government would draw from expressions by the House Appropriations Committee chairmen in 1970 and 1972, 20 years after the enactment of Title V, with respect to the fee policies of the regulatory agencies (Br. 7, n.3; 24-25, n.16).

To the extent that subsequent legislative activity might be considered relevant by the Court, NEPCO would point to the 1952 hearings before the Senate Committee on Interstate and Foreign Commerce in connection with the fee policy of the Interstate Commerce Commission. S. 2352 had been introduced to amend section 18 of the Interstate Commerce Act to provide that:

> Each person holding a certificate, permit, or license under this Act shall pay to the Commission annually such license fee as the Commission shall determine to be fair and reasonable for such certificate, permit, or license for the purpose of reimbursing the United States for the costs of administering this Act. Such fees shall be covered into the Treasury.

This language would in unmistakable terms have authorized the Interstate Commerce Commission to impose annual assessments against persons licensed by that agency for the costs of administering the Interstate Commerce Act, in the pattern of § 10(e) of the Federal Power Act. In the Senate hearings on the bill, neither proponents or opponents of the bill took the position that Congress had already conferred such authority on the ICC and other agencies a year earlier in Title V. S.2352 was not reported out of Committee. See S. Rep. No. 1467, 84th Cong., 2nd Sess. (1956).

paring regulations, to be promulgated under authority of Title V of the Independent Offices Appropriation Act of 1952, designed to receive approximately $500,000 per year, through filing and certificating fees, to reimburse the Government for the costs of certificating natural-gas facilities," and stressed that "no reasonable opportunity to increase collections on a legal and equitable basis will be overlooked."[30] However, the Commission struggled with the question of its legal authority to implement even such filing fees until 1965.[31] In its notice of proposed rule-making which eventually resulted in Order No. 317 establishing a schedule of fees to be paid by applicants for natural gas pipeline certificates and other authorizations under the Natural Gas Act, the Commission explained its reasons for limiting the establishment of fees to the recoupment of costs associated with the processing of applications:[32]

> 3. The regulatory activities of the Federal Power Commission convey special benefits to

---

[30] *Hearings on Independent Offices Appropriations for 1955 Before a Subcommittee of the House Committee on Appropriations*, 83rd Cong., 2d Sess. 323 (1954). The referenced Natural Gas Act filing fees were not implemented until 1966. 35 F.P.C. 30, 392.

[31] In response to the continuing study of user charges by the Senate Government Operations Committee, Chairman Kuykendall later wrote to Senator McClellan in November 1955 in response to a series of questions on user charges and expressed the opinion that Title V afforded no adequate guidance as to when a particular federal activity, such as the Commission's licensing and regulatory functions, constituted a special benefit to a particular group. He pointed out that "what seems lacking is the necessary particularity as to the distinction between 'services' to particular groups and 'service' in the public interest."

[32] Notice of Proposed Rulemaking, Docket No. R-282, issued September 22, 1965, 30 F.R. 12077 (emphasis added).

identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies.* The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydro-electric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

The Commission's 1965 rationale comports fully with the Congressional intent underlying Title V. Its recent change of mind[33] must be weighed against almost twenty years of consistent administrative construction by the Commission which gave Title V sig-

[33] The Commission now simply states that it no longer agrees with its 1965 interpretation. R. 264

nificantly more limited applicability than the part of the order set aside by the court below.

The Government cites no other agency which has taken such an expansive view of Title V as the Commission now asserts, and our research has uncovered none. A number of agencies have established filing fees of the kind which are not in dispute here.[34] Others charge a fee when a license or certificate is issued[35] and sometimes a nominal annual charge is assessed on the licensees.[36] However, none has sought to recover broad program costs from an entire industry on the tenuous "economic climate" basis relied on by the Commission. The closest similar action appears to be that of the FCC in assessing annual fees on the CATV industry, which is in issue in *National Cable Television Asso.* v. *U.S.*, No. 72-948, now pending before the Court. Even there, however, the court below purported to find a "special benefits" basis for the imposition of the FCC charges.[37] Whether or not the CATV annual fee issue was correctly decided, the industry and regulatory differences involved clearly make that decision distinguishable from the invalida-

---

[34] See, e.g., 14 C.F.R. § 389.25 (Civil Aeronautics Board); 49 C.F.R. § 1002.2 (Interstate Commerce Commission); 10 C.F.R. §§ 170.12(a), 170.21 (Atomic Energy Commission); 17 C.F.R. § 240.12b-7 (Securities and Exchange Commission).

[35] 10 C.F.R. §§170.12(b), 170.21 (Atomic Energy Commission); 14 C.F.R. § 389.25(a)(2) (Civil Aeronautics Board); 17 C.F.R. § 240.15b9-1 (Securities and Exchange Commission).

[36] 17 C.F.R. §§ 240.15b9-2; 275.203-3 (Securities and Exchange Commission); 10 C.F.R. §§ 170.12(c), 170.21 (Atomic Energy Commission).

[37] *Clay Broadcasting Corp.* v. *U.S.*, 464 F. 2d 1313, 1322 (5th Cir. 1972), cert. granted *sub nom. National Cable Television Asso.* v. *U.S.*, No. 72-948.

tion of the FPC charges for the administration of parts II and III of the Federal Power Act involved in this case.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed insofar as it relates to annual assessments for FPC activities under the Federal Power Act.

Respectfully submitted,

THOMAS M. DEBEVOISE
WILLIAM J. MADDEN, JR.
JEROME C. MUYS
745 Shoreham Building
Washington, D. C. 20005
(202) 393-2080
Attorneys for New England Power Company, Respondent

September 19, 1973

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

May 21, 1951

BULLETIN No. 51-13

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Charges for Government services and products

1. *Purpose.* The attached form, Government Charges Questionnaire, Exhibit 51-13, is designed to obtain information needed for a comprehensive survey of the existing system of Government charges. As the first part of such a survey, there will be prepared a complete list of services and products provided the public with or without charge. Following the preparation of such a list, an analysis of certain types of charges will be made. One of the purposes of the analysis will be to determine whether present charges are adequate and whether charges should be made for certain goods and services now provided free.

The President has stated that "While it is not sound public policy to charge for all services of the Federal Government on a full cost basis, and many services should be provided free, the Government should receive adequate compensation for certain services primarily of direct benefit to limited groups."

Congressional and public interest concerning the adequacy of fees for Government services has been growing. In the last session of Congress, the Senate Committee on Expenditures in the Executive Departments made a sample study covering 12 agencies and issued Senate Report No. 2120, "Fees for Special Services." The House Ways and Means Committee passed a resolution on December 7, 1950, requesting the Bureau of the Budget to proceed with a

APPENDIX

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

May 21, 1951

BULLETIN No. 51-13

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Charges for Government services and products

1. *Purpose.* The attached form, Government Charges Questionnaire, Exhibit 51-13, is designed to obtain information needed for a comprehensive survey of the existing system of Government charges. As the first part of such a survey, there will be prepared a complete list of services and products provided by the Government with or without charge. Following the preparation of such a list, an analysis of certain types of charges will be made. One of the purposes of the analysis will be to determine whether present charges are adequate and whether charges should be made for certain goods and services now provided free.

The President has stated that "While it is not sound public policy to charge for all services of the Federal Government on a full cost basis, and many services should be provided free, the Government should receive adequate compensation for certain services primarily of direct benefit to limited groups."

Congressional and public interest concerning the adequacy of fees for Government services has been growing. In the last session of Congress, the Senate Committee on Expenditures in the Executive Departments made a sample study covering 12 agencies and issued Senate Report No. 2120, "Fees for Special Services." The House Ways and Means Committee passed a resolution on December 7, 1950, requesting the Bureau of the Budget to proceed with a

study of charges for services provided by the Federal Government. The House Committee on Appropriations has proposed a section on this subject in the Independent Offices Appropriation Bill, 1952; the Committee's views are set forth in House Report No. 384.

2. *Coverage.* The provisions of this Bulletin apply to all Federal departments and establishments except the municipal government of the District of Columbia.

3. *General instructions.* It is suggested that each agency attempt to obtain the advice and opinions of responsible operating staff members who deal most directly with persons now paying Government charges and with persons now enjoying the benefits of those Government goods and services provided without charge. Comments and suggestions from field office staff regarding the feasibility and advisability of changing current practices, therefore, will be especially valuable.

[1]

The questionnaire covers all goods and services which are of direct benefit to limited groups of individuals, businesses, and other organizations. Services which are provided to identifiable individuals, businesses, or other organizations should be reported even though they are also indirectly of benefit to the general public. Services provided Federal employees (including members of the armed forces) and their dependents should be reported unless they are legally part of the employees' compensation. Goods and services provided on a cost contract basis are also to be reported. Intragovernmental services (for example, services provided for one agency by another through working funds) are not to be reported.

The types of goods and services provided by the Government which should be reported on Exhibit 51-13 are listed below. This list also shows the classes of miscel-

laneous receipts accounts of the Treasury into which charges now made for these goods and services are deposited.

Type of goods or services	*Class of miscellaneous receipts accounts*
(1) Coinage services	(1) Coinage
(2) Permits, licenses, and other registration services	(2) Fees for permits and licenses
(3) Use of money (through loans and advances)	(3) (Interest (Dividends and other earnings
(4) Use of property	(4) Rents
(5) Leases for obtaining minerals, oil, gas, etc. (6) Use of patents, copyrights, etc.	(5) and (6) Royalties
(7) Other products provided	(7) Sale of products
(8) Other services provided	(8) Fees and other charges for services

• • • • • • • • • • •

APPENDIX B

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

BULLETIN No. 58-3 November 13, 1957

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User charges for certain Government services

1. *Purpose.* This Bulletin calls for the preparation of legislative proposals essential for the development of an equitable and uniform Government-wide policy on charges for certain Government services or property.

Following a careful and thorough joint interdepartmental review of this problem, the President has approved the recommendations made to him. The review, including these recommendations, is attached for information and guidance.

The President has requested the Bureau of the Budget to initiate actions in accordance with those approved recommendations. This Bulletin therefore requests each executive agency to prepare legislative proposals for removing all present limitations or restrictions on the agency's authority to (a) recover full costs for Government services which provide a special benefit; and (b) obtain a fair market value for Government-owned resources or properties sold or leased.

This Bulletin supersedes Bureau of the Budget Circular No. A-25 dated November 5, 1953, the coverage of which was more limited.

2. *Coverage.* Except for the specific exclusions mentioned later in this Bulletin, the legislative proposals should include all areas in which existing legislation prohibits or restricts the application of charges or fees. The proposals should also include areas in which existing legislation is silent on the subject of such charges but where the agency considers an expression of congressional policy desirable prior to initiating charges.

Legislation shall be considered restrictive when it does not permit full cost recovery by the Federal Government for Federal services or products provided which convey to some recipients a special benefit above and beyond that accruing to the public at large. In addition, legislation shall be considered restrictive if it hampers (a) the realization of a fair market value from the sale or use of federally owned resources or property or (b) the application of sound business management principles and comparable commercial practices in the sale of such resources and property.

[1]

The areas excluded from the attached document (see second paragraph under "Coverage") are also excluded from the provisions of this Bulletin. In addition, this Bulletin does not apply to the disposal of property under approved programs to charitable, governmental, and related agencies or instrumentalities.

3. *Data to be submitted.* Legislative proposals will be submitted to the Bureau of the Budget in accordance with Circular A-19, Revised, not later than February 1, 1958. They shall be accompanied by a short explanation of their background and effect.

4. *Other actions.* In those areas where present legislative authority is adequate and no legislative proposal is submitted, the head of each agency should determine and act on applying user charges in his agency in accordance with the recommendations in the attached report and the provisions of existing law. These actions should not be deferred pending efforts to remove or clarify legislation restricting user charges in other areas.

By direction of the President:

PERCIVAL F. BRUNDAGE
Director

Attachment

[2]

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON, D. C. 20503

September 23, 1959 CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a

measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

[1]

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

• • • • • • • • • • •

[2]

Syllabus

FEDERAL POWER COMMISSION *v.* NEW ENGLAND POWER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1162. Argued December 3, 1973—Decided March 4, 1974

The Independent Offices Appropriation Act, 1952 (the Act) authorizes each federal agency to prescribe a fee, charge, or price for services provided by the agency "to or for any person (including groups . . .)," determined to be fair and equitable, consideration being taken of "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ." Pursuant to the Act, the Federal Power Commission imposed an annual assessment against all jurisdictional electric utilities in proportion to their wholesale sales and interchange of electricity, and against all natural gas companies with operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. On petitions for review, the Court of Appeals set aside these annual charges, holding that whole industries are not in the category of those who may be assessed under the Act, the thrust of which reaches only specific charges for specific services to specific individuals or companies. *Held:*

1. While the Act includes services rendered "to or for any person (including groups . . .)," since the Act is to be construed to cover only "fees" and not "taxes," *National Cable Television Assn.* v. *United States*, *ante*, p. 336, the "fee" presupposes an application for the agency's services, whether by a single company or group of companies or the receipt of a specific beneficial service. P. 349.

2. The Act is to be construed as authorizing a reasonable charge to "each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit," and as precluding a charge for services rendered "when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." Pp. 349–351.

151 U. S. App. D. C. 371, 467 F. 2d 425, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the result, in which BRENNAN, J., joined, *post*, p. 352. BLACKMUN and POWELL, JJ., took no part in the decision of the case.

Keith A. Jones argued the cause for petitioner. On the brief were *Solicitor General Bork, Leo A. Forquer*, and *George W. McHenry, Jr.*

Thomas M. Debevoise and *Stanley M. Morley* argued the cause for respondents. With *Mr. Debevoise* on the brief for respondent New England Power Co. were *William J. Madden, Jr.*, and *Jerome C. Muys*. With *Mr. Morley* on the brief for respondent Independent Natural Gas Association of America were *Jerome J. McGrath* and *Francis H. Caskin*. *L. F. Cadenhead* and *Melvin Richter* were on the brief for respondent Tennessee Gas Pipeline Co., a division of Tenneco, Inc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, companion to *National Cable Television Assn.* v. *United States, ante*, p. 336, raises another important problem of construction of the provisions of the Independent Offices Appropriation Act, 1952, Tit. 5, 65 Stat. 290, 31 U. S. C. § 483a. The Federal Power Commission established filing fees under the Natural Gas Act and under the Federal Power Act. These filing fees have not been challenged. What was challenged were annual assessments under both Acts, levied in an effort of the agency to recoup some of the remaining costs under the two Acts.

With respect to electric utilities, the Commission determines each year the costs of administering the Federal Power Act. The costs associated with the Commission's efforts to promote the co-ordination and

reliability of nonjurisdictional electric systems are not included. The Commission also deducts from administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amount received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities[1] in proportion to their wholesale sales and interchange of electricity. In 1971 these companies had gross revenues of some $21 billion and net income of nearly $4 billion. The annual assessment challenged here involved 1973 and for all such electric companies was $5 million or 0.024% of gross revenue and 0.14% of net income.

As respects natural gas companies, the Commission determines each year the costs of administering the natural gas pipeline programs under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.* These costs, after deducting amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report on their total gas supply (18 CFR § 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certificated each year to support the cost of the producer certificate program.

[1] Part I of the Federal Power Act covering licenses to hydroelectric companies, see 16 U. S. C. § 797 *et seq.*, is not involved in this litigation, only Parts II, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, and III, 49 Stat. 854, 16 U. S. C. § 825 *et seq.* Moreover, the "jurisdictional" aspect of a public utility's activities refers, *inter alia*, to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce as contained in § 201 of the Act, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, the provision that filled the gap created by *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. See *United States* v. *Public Utilities Comm'n*, 345 U. S. 295.

The Commission in its report, 45 F. P. C. 440 and 964, said as respects both electric utilities and natural gas companies that regulations have provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved." *Id.*, at 445. It mentioned the "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system." *Id.*, at 445 n. 5. The Commission, while noting that its regulatory activities were beneficial to consumers, added that its actions:

> "have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands." *Id.*, at 445.

As respects electric utilities it noted that its regime was "system wide and beneficial" to the companies. *Id.*, at 966. As respects natural gas pipelines it listed its activities that were beneficial to them:

> "the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines." *Id.*, at 967.

On petitions for review the Court of Appeals set aside that portion of the Commission's order establishing annual charges, 151 U. S. App. D. C. 371, 467 F. 2d 425. As already noted, the case is here on a petition for certiorari, 411 U. S. 981.

The Act in question, 31 U. S. C. § 483a, authorizes the head of each federal agency to prescribe a "fee, charge, or price" for any "benefit, privilege, . . . license, permit, certificate, registration or similar thing of value . . . provided . . . by [the] Federal agency . . . for any person (including groups, . . . corporations . . .)" which he determines "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ."

The Court of Appeals held that whole industries are not in the category of those who may be assessed, the thrust of the Act reaching only specific charges for specific services to specific individuals or companies. We agree with the Court of Appeals.

The report on the Act, H. R. Rep. No. 384, 82d Cong., 1st Sess., 2, states that "[t]he Committee is concerned that the Government is not receiving full return from many of the services which it renders to *special beneficiaries*" (emphasis added). It is true that the Act includes services rendered "to or for any person (including groups . . .)." But if we are to construe the Act to cover only "fees" and not "taxes"—as we held should be done in the *National Cable Television* case, *ante*, p. 336, the "fee" presupposes an application whether by a single company or by a group of companies. The Office of Management and Budget (then known as the Bureau of the Budget) issued a circular in 1959 [2] construing the Act. That circular stated that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." [3]

[2] Budget Circular No. A-25, Sept. 23, 1959.

[3] The circular goes on to state that the services include agency action which: "provides special benefits . . . above and beyond those

(Emphasis added.) The circular also states that no charge should be made for services rendered, "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." [4]

---

which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

"(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e. g., receiving a patent, crop insurance, or a license to carry on a specific business); or

"(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e. g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

"(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e. g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

[4] Since oral argument we have been advised by the Solicitor General that of all federal agencies "having industry-wide regulatory authority" there are two, other than the Federal Power Commission and the Federal Communications Commission, which impose "annual industry-wide fees analogous" to those in the instant case. The Solicitor General summarizes the actions of the other two federal agencies as follows:

"The fee schedule of the Atomic Energy Commission is set forth at 10 C. F. R. 170.21 and 170.31 and was last revised on October 29, 1973 (38 Fed. Reg. 30254–30255). Under that schedule, operators of nuclear power reactors are subject to a minimum annual fee of $20,000 and operators of other nuclear facilities are subject to annual fees ranging from $8,500 to $215,000. Holders of materials licenses are assessed annual fees of up to $27,000. The Commission estimates that approximately $7 million will be recovered from these annual fees in fiscal year 1974. The Commission's fee schedule, including annual fees, was first adopted in 1968.

"The Securities and Exchange Commission imposes an annual

We believe that is the proper construction of the Act. Though it greatly narrows the Act from the dimensions urged by the Commission, it keeps it within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's "economic climate" argument would lead. Some of the assessments made by the Commission under its formula would be on companies which had no proceedings before the Commission during the year in question. The "identifiable recipient" of a unit of service from which "he derives a special benefit," to quote the Office of Management and Budget, does not describe members of an industry which have neither asked for nor received the Commission's services during the year in question. A blanket ruling by the Commission, say on accounting practices, may not be the result of an application. But each member of the industry which is required to adopt the new accounting system is an "identifiable recipient" of the service and could be charged a fee, if the new system was indeed beneficial to the members of the industry. There may well be other variations of a like nature which would warrant the fixing of a "fee" for services rendered. But what was done here is not within the scope of the Act. Hence the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the decision of this case.

---

fee of $100 on each of the approximately 1100 investment advisers registered with it under the Investment Advisors Act of 1940, 15 U. S. C. 80b–1 et seq. See 17 C. F. R. 275.203–3 (b). This fee was first adopted in 1972."

This statement covers only fees imposed under Tit. V, not those authorized "under more specific grants of statutory authority."

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the result in No. 72–1162 and dissenting in No. 72–948, *ante*, p. 336.

These cases present two distinct issues involving interpretation of the Independent Offices Appropriation Act of 1952: first, whether sufficient "work, service, . . . benefit, . . . or similar thing of value or utility" was conferred on the CATV operators or utility companies to warrant imposition of a fee under the statute; and, second, whether, if a fee was justifiably imposed, the amount of the fee was determined in accordance with a proper interpretation of the statutory standard that it be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." 31 U. S. C. § 483a.

The Court, however, fails to recognize that these issues require independent analysis. Instead, permeating the Court's opinions on both issues is an attempt to draw metaphysical distinctions between a "fee" and a "tax." I do not find this approach either helpful or appropriate; whatever the label, the questions presented in these cases involve simply whether the charges assessed by the Commissions were authorized by Congress. The Court's approach merely beclouds its analysis, producing results which seem to me inconsistent and affording guidance to the agencies in setting their fee policies which might be charitably described as uncertain.

This approach is allegedly based on the need to construe the statute narrowly to avoid constitutional difficulties. I do not believe that any serious question of the constitutionality of the Act would be presented if Congress had in fact authorized these charges. The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative

agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes,[1] at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms," *United States* v. *Robel*, 389 U. S. 258, 272 (1967) (BRENNAN, J., concurring). This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U. S. 156 (1973)—if not more so. It is hardly surprising that, until today's de-

[1] "Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests. Unrealistic verbiage in some of the older judicial opinions should not now be taken seriously. The effective law is in accord with a 1940 statement of the Supreme Court: 'Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.' [*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940).] Much of the judicial talk about requirement of standards is contrary to the action the Supreme Court takes when delegations are made without standards. The vaguest of standards are held adequate, and various delegations without standards have been upheld. . . .

"In only two cases in all American history have congressional delegations to public authorities been held invalid. Neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties. The Panama case [*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)] was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today. The Schechter case involved excessive delegation of the kind that Congress is not likely again to make. . . .

"In absence of palpable abuse or true congressional abdication, the non-delegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force." 1 K. Davis, Administrative Law Treatise § 2.01 (1958) (footnotes omitted).